SUPREME COURT.

Headnotes to Decisions January Term, A. D. 1900.

Frank Roberson, Plaintiff in Error, vs. The State of Florida, Defendant in Error—Duval county.

MABRY, J.:

1. When an application for a change of venue, based upon the ground of prejudice against the accused in the county where the trial is had, is supported only by the affidavit of the accused, the refusal of the trial court to grant it will not be reversed in the absence of any showing that the decision was not based upon the insufficiency of the proof of the facts alleged in the affidavit, and it does not appear that the accused was prevented from getting corroborative evidence by hostile public sentiment.

2. A motion in arrest of judgment on the ground of a defect in the indictment should be exhibited in the record proper, and not in the bill of exceptions.

3. An indictment alleging the infliction of a mortal wound upon the body of the deceased is sufficient without stating upon what particular part of the body the wound was inflicted.

4. The court instructed the jury that "sheriffs, deputy sheriffs and constables are not only authorized to arrest public offenders without warrant, but are required to do so, for all offenses committed in the presence of an officer:" *Held*, to be erroneous as not correctly stating the law on the subject.

5. The court refused an instruction for the defendant to the effect that a sheriff and his deputies have no right to make an arrest of any person without lawful warrant, except the person has committed a felony or is engaged at the time in a riot or unlawful assembly, or is about to commit a felony: *Held*, that the refusal was correct because of the failure of the instruction to include the idea that the officer may arrest without warrant for any misdemeanor tending to a breach of the peace when committed in view of the officer making the arrest.

6. When a general exception is taken to the refusal of the court to give several charges asserting separate distinct propositions of law, and any one of the charges is wrong, the exception will be disallowed.

Judgment reversed.

T. A. & B. B. MacDonell, for plaintiff in error; William B. Lamar, Attorney-General, for the State.

Albert Gray, Plaintiff in Error, vs. The State of Florida, Defendant in Error—Jackson county.

MABRY, J.:

1. A statement in a motion for a new trial is not self-supporting in view of a ruling of the court denying it.

2. Chapter 4400, Laws of 1895, prohibits prosecuting officers from commenting before the court or jury upon the failure of an accused to testify as a witness in his own behalf, and it is the duty of trial courts to see that such impropriety is not committed.

3. After the State closed its testimony, the accused examined several witnesses in his defense, though he did not testify in his own behalf; the prosecuting officer in his argument to the jury stated that the evidence as it stood before them unexplained and uncontradicted, although it did not point positively to the defendant, was sufficient to warrant a verdict of guilty: *Held*, To be a permissible comment on the evidence as it existed, avoiding as it did, any reference to the failure of the defendant himself to explain or contradict what had been introduced.

4. Near the body of a deceased found in a road a human track was seen leading away with certain peculiarities; a witness for the State testified that about one month before the killing he saw tracks made by the accused and they were the same as that found near the body: *Held*, not to be objectionable on the ground of remoteness.

5. To show flight after a homicide it is competent to prove by witnesses living so near the accused and accustomed to see him so often when at home that a failure to see him there would tend to show absence, that he was not seen there after the killing.

6. Testimony having a tendency to prove a material circumstance in the case is material though its bearing may be slight.

7. After the retirement of the jury under the charge of the court they returned into court and requested to know whether under the law they must find a verdict of murder in the first degree or acquit, or whether they could find the accused guilty of some lesser offense, and the court reread to them portions of the charge given bearing on the matter enquired about; thereupon defendant objected to a word in the charge on the ground that it was indefinite and the court added in writing and read to the jury the explanation of the word as insisted on by the defendant: *Held*, That the objection made was removed by the explanation given by the court.

8. A portion of a charge excepted to must be construed in connection with other portions given and also the facts in evidence.

9. It is proper to refuse a portion of a charge asserting that the jury should know to a moral certainty that they have all the facts and circumstances before them before they can convict; and if they feel after considering the evidence that some important matter of proof has been omitted, and their minds were not satisfied, this was a reasonable doubt upon which they should acquit.

10. Testimony held sufficient to sustain the verdict.

Judgment affirmed.

Calhoun & Farley, for plaintiff in error; William B. Lamar, Attorney-General, for the State.

Bill Morrison, Plaintiff in Error, vs. The State of Florida, Defendant in Error.—Holmes county.

TAYLOR, J.:

Criminal Law—Charging in Writing—Utilizing Charges Given in Another Case — Reiterating Charges Given—Charges to be Given Literally as Written—Dying Declarations, Where There are Several, any one or all Admissible—Appearances of Danger in Self-Defense.

1. Section 2920, Revised Statutes, provides that the charges of the court to the jury in capital cases shall be wholly in writing, and section 1091, Revised Statutes, provides that such charges shall be signed by the judge and be by him filed in the case immediately after delivery or refusal, and form part of the record in the case. When charges are given and filed in compliance with these provisions of law, they become *a part of the record in the particular case in which they are given*, and trial judges should not withdraw them from the record of the case of which they form a part, and make them by refiling and interlineations a part of the record of another, different and subsequent case.

2. Charges in writing should be given literally as they are written.

3. Exceptions to the form or manner in which charges are given should be seasonably made, at least before the rendition of the verdict, otherwise objections thereto will be held to have been waived.

4. Where a mortally wounded party, under a full appreciation of his condition, with a full belief in the certainty of his imminently impending death, and without hope of recovery, makes several complete statements at different times of the transaction by which he received his wounds, any one or all of such complete statements are admissible in evidence, and the State is not confined to any particular one of them, nor is it necessary to offer all of the separate and distinct statements made at different times in order to render other distinct declarations, made at other times, admissible in evidence. Should any of such several declarations be inconsistent or contradictory to others made by the declarent, it is open to the defense to show the fact, and the burden is upon the defense to show it if it exists.

5. The following charge: "In considering and weighing the evidence you should use the same judgment, reason, common sense and general knowledge of men and affairs as you have in every day life," held to be proper.

6. The appearances of impending imminent danger to one's life or limb must be such as would actuate a reasonable, cautious and prudent man, before they can excuse the giving of a mortal blow in self-defense.

7. A verdict convicting of murder in the second degree will not be set aside on the ground that the evidence does not make out that degree of the crime in terms as defined by the statute, if the evidence in the case would have supported a finding of murder in the first degree.

8. An indictment containing a single count charging murder in the first degree also contains a charge of murder in the second degree.

The majority of the court hold the evidence sufficient to sustain the conviction (Taylor, C. J., dissents).

Judgment affirmed.

D. L. McKinnon, for plaintiff in error; William B. Lamar, Attorney-General, for the State.

The Jacksonville Street Railroad Company, Plaintiff in Error, vs. R. J. Walton and Margaret E. Walton, Defendants in Error—Duval county. On motions to strike Bill of Exceptions.

TAYLOR, C. J.:

Appellate Practice—Bills of Exception, how prepared—Striking parts or the whole of Bills of Exception—Matter erased from Bill before Judge's Signature—Care to be used in Certifying—Reference to Evidentiary Bill to test substantial make up of Bill proper.

1. Where the Circuit Judge before certifying and signing a bill of exceptions strikes or erases matter therefrom, such erased or stricken matter forms no part of such bill, and it should be omitted by the clerk in copying such bill into the transcript of the record on writ of error.

2. Where a bill of exceptions is regularly incorporated in a transcript of record that is properly certified by the clerk below to contain a true and correct copy of such "papers and proceedings in said cause as appears upon the records and files of his office," in the absence of any proper showing to the contrary, it is sufficient evidence of the fact that such bill of exceptions was filed with the clerk below.

3. The duty devolves upon the plaintiff in error or his counsel upon resort to an appellate court to make the errors complained of clearly to appear, if they in truth exist, by a proper record of all the facts and circumstances pertinent to, and connected with, such alleged error, but in exhibiting them the duty likewise devolves upon him to exhibit all such facts and circumstances fairly and truly. And when such matters are exhibited by a bill of exceptions, the duty likewise devolves upon the trial judge to see to it carefully, before giving such bill authenticity by his signature and certificate, that it does fairly, fully, truly and justly set forth the matters exhibited thereby exactly as they transpired at the trial, and this duty is emphasized when it is remembered that a bill of exceptions depends for its authenticity upon the certification and signature thereof by the trial judge, and that when so certified and signed it imports to an appellate court absolute verity, and can not be altered, amended, averred against or impeached in the appellate court by anything *dehors* the certified record.

4. An *evidentiary bill of exceptions*, that should contain *all the evidence, but nothing besides the evidence*, in the case, was designed for the purpose of entirely separating for appellate review the question of the *sufficiency of the evidence to support the verdict*, when presented by an appropriate assignment of error, from all other questions raised by any other assignment of error; and, too, for the purpose of determining whether, in view of the whole evidence in the case exhibited thereby, any error found is harmless. The bill of exceptions proper was designed to exhibit all other questions *in pais* than the sufficiency of the evidence to support the verdict, and should in and of itself, without reference to the evidentiary bill, fully, fairly and truly exhibit all pertinent matters necessary to the proper consideration and adjudication of the different assignments of error thereby expected to be maintained. The *bill of exceptions proper* will never be resorted to to test the question of the sufficiency of the evidence to support the verdict, that question being exclusively confined to a consideration of *the whole evidence as set forth and exhibited in and by the evidentiary bill*, regardless of such such parts or portions of the evidence as may be exhibited in the bill of exceptions proper for the *expose* therein of other questions assigned as error. While this is the distinctive office of said two respective bills of exception, that will in every case govern and guide the appellate court in the *final consideration of cases on their merits*, and while the court upon such *final consideration* will not refer from one of such bills of exception to the other in aid of, explanatory of, or to supplement, or to impeach any matter or question that, under the rules, properly belongs exclusively to either, except to determine from the evidentiary bill whether any error found is harmless; yet on a *preliminary motion*, seasonably made, *directly to test the question of compliance with the rules in the make-up of the bill of exceptions proper*, the court, for the purpose of determining such question, will resort to the evidentiary bill, as part of the whole authenticated record in the case, when it is urged that such evidentiary bill will disclose the fact that the bill of exceptions proper has been made up in its substance in patent violation of the rules, and in such manner as to make that appear to be error which may not be error were the proper matters set forth in such bill that the rules contemplate it should contain, and that have been omitted therefrom, and such evidentiary bill shows could with truth and propriety have been included therein. And upon such preliminary motion the court will not strike out the whole or any part of the bill of exceptions proper, when there are other questions properly presented thereby for adjudication, but upon such motion will adjudge in advance that it will not consider, on the final determination of the case, any assignment of error founded upon matter thus improperly set forth. (Carter, J., dissenting).

5. The well-established rule is that every charge given by the court to the jury must be predicated upon some testimony adduced in the case tending to support the *facts hypothesised in such charge*. The design of the rules adopted for the preparation of bills of exception proper in requiring a statement of the evidence, or what the evidence tended to prove in connection with the charge predicated on such evidence, was not for the purpose of testing the truth of such evidence, or as a test of the weight or preponderance of evidence, but solely for the purpose of disclosing to the appellate court whether or not the above well-settled rule had been observed by the trial judge in his charges of the law of the case to the jury, *viz:* whether the charges given, or requested and refused, were or were not *predicated on sufficient evidence adduced in the case*. All that the rules contemplate or require in the exposition of the evidence upon which charges were predicated is that the bill of exceptions proper shall correctly state, in connection with every charge that hypothesises any given state of facts, the evidence actually adduced in the case *that tends to establish the particular state of facts hypothesised in such charge*, and this in as concise form as is compatible with a just, fair and complete test of the proposition as to whether or not such charge was warranted by the facts adduced in evidence. The testimony adduced in rebuttal or impeachment of the evidence upon which any charge was predicated has no place in the exposition in the bill of exceptions of the evidence upon which such charge was actually predicated; neither should evidence be stated in connection therewith that is wholly foreign to the state of facts *hypothesised in the given charge*. If a charge is given, or requested and refused, by a judge that hypothesises a state of facts or a statement of fact that there was no testimony tending to prove, the fact should be stated in the bill of exceptions that there was no evidence adduced tending to prove the state of facts or fact hypothesised in such charge; or, if there is difference of opinion as between counsel and the judge as to the true tendency of the proof conceived to be supportive of any such charge, the particular evidence itself thus conceived to be supportive thereof should be stated in the bill of exceptions, so that the appellate court may determine the applicability of the charge to the proofs thought to be in sustenance of it.

6. The rules contemplate that in making up bills of exception based upon the admission or rejection of evidence, where the evidence admitted or rejected, forming the subject of the exception does not in and of itself show upon its face its pertinency and relevancy to the issue being tried, and there is other evidence either admitted, or proffered and rejected, that will connect it with the case and show its relevance and pertinence, such other connecting evidence should be set forth in the bill of exceptions so as to enable the appellate court fully and fairly to pass upon the propriety or impropriety of the admission or rejection thereof.

Motions to strike bill of exceptions and specified parts thereof denied.

Alex. St.-Clair Abrams, for motions; John E. Hartridge and J. B. Whitfield, contra.

M. B. King, Plaintiff in Error, vs. The State of Florida, Defendant in Error—Duval county.

MABRY, J.:

1. Section 2591, Revised Statutes, providing that whoever aids or assists a prisoner in escaping, or attempting to escape, from an officer, or person who has the lawful custody of such prisoner, shall be punished, etc., does not so describe the offense intended to be created as to come within the rule that an indictment or information following the language of a statute without further expansion will be sufficient.

2. An essential of the crime created by Section 2591, Revised Statutes, is that aid and assistance to escape, or attempt to escape, must be given to a prisoner in lawful custody, and under Section 2892 an allegation that the prisoner was at the time of being assisted to escape held in lawful custody of a known public officer authorized to have such custody will be sufficient.

Judgment affirmed.

A. W. Cockrell & Son, for plaintiff in error; William B. Lamar, Attorney-General, for the State.

A Story of Culberson.

In the Fifty-first congress, when Speaker Reed first gained the title of "czar" by his arbitrary decisions, Judge Culberson was one of his strongest supporters, although he gave the speaker no public indorsement, for political reasons. One afternoon while the Democrats were in a terrible tumult over a decision of the speaker and the proceedings of the house were very near riot a thunderstorm came up. When the confusion was highest, a blinding flash of lightning and a terrible crash of nature's artillery startled every soul on the floor and caused a profound silence. Judge Culberson, like everybody else, was deeply moved, but was the first to recover. "That was God Almighty, sir, calling this house to order," he exclaimed in an impressive tone, addressing the speaker. Then, turning to his colleagues, he said, "Now let us proceed to business like men."

An Unreliable Adage.

"I suppose you lay a great deal of stress on the adage 'Money talks,'" said the man who gets familiarly facetious.

"No, sir," said Senator Sorghum. "If you had observed as many investigations as I have, you'd know that the success of pecuniary enterprise frequently depends on the ability to keep perfectly still."—Washington Star.

Kind of Her.

May—The girls were all crazy to know whether you are engaged.

Marion—But you didn't tell them, did you?

May—Oh, no! I said that when the time came you wanted to announce it yourself.—Detroit Free Press.

The Roar of Battle.

The roar of the navy's four point seven's, their crash, their rush as they passed, the shrill whine of the shrapnel, the barking of the howitzers and the mechanical, regular rattle of the quick firing Maxims, which sounded like the clicking of many mowing machines on a hot summer's day, tore the air with such hideous noises that one's skull ached from the concussion, and one could only be heard by shouting. But more impressive by far than this hot chorus of mighty thunder and petty hammering was the roar of the wind which was driven down into the valley beneath and which swept up again in enormous waves of sound. It roared like a great hurricane at sea. The illusion was so complete that you expected, by looking down, to see the Tugela lashing at her banks, tossing the spray hundreds of feet in air and battling with her sides of rock. It was like the roar of Niagara in a gale, and yet when you did look below not a leaf was stirring, and the Tugela was slipping forward, flat and sluggish and in peace.—From "With Buller's Column," by Richard Harding Davis, in Scribner's.

Ahead on Prayers.

A bishop traveling in the depth of winter came to a house of a presiding elder to spend the night. The weather was bitterly cold, and the bedroom into which the bishop was shown had a thick coating of ice on the windows. The elder waited to see the bishop safely between the feather beds. But when the bishop, half frozen, jumped into bed without stopping to say his prayers the elder remonstrated with him.

"You have forgotten to say your prayers," he said.

"No," answered the bishop. "I always keep 'prayed up' in preparation for nights that are as cold as this."

Natural as Life.

Two ladies who had not seen each other for years recently met in the street. They recognized each other after a time, and their recognition was cordial.

"So delighted to see you again. Why, you are scarcely altered."

"So glad, and how little changed you are! Why, how long is it since we met?"

"About ten years."

"And why have you never been to see me?"

"My dear, just look at the weather we have had."

Growing Cold.

Mrs. Bridey (sobbing)—I don't care what you say, Harry doesn't love me as much as he did.

Her Mother—How ridiculous! Why, only this morning I heard him tell you you were the dearest girl on earth.

Mrs. Bridey—That's just it. He used to call me "the dearest girl that ever lived."—Philadelphia Press.